Supreme Court, U.S.
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No. 95-499 AUG 8 1995

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# IN THE
# Supreme Court of the United States

October Term, 1995

James Cleland, Petitioner

v.

City of Burlington, Respondent

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## Petition for Writ of Certiorari To The Supreme Court of the State of Washington

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## Petition for Writ of Certiorari

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## QUESTION PRESENTED FOR REVIEW

Whether the "implied consent" scheme adopted by the State of Washington, including the warnings given pursuant thereto, provide a meaningful opportunity for defendants to obtain exculpatory evidence.

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RCW 46.20.308

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WAC 448-13-210

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OPINIONS BELOW

The Court of Appeals of the State of Washington, Division One, has issued an unpublished opinion, No. 32296-6-I.

JURISDICTION

The judgment of the Supreme Court of the State of Washington, denying the Petitioner's Petition for Review was entered on May 10, 1995. The jurisdiction of the Court is invoked under the provisions of 28 USC 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The first section of the Fourteenth

Amendment to the Constitution, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 46.61.506, which provides as follows: 1. Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, it the amount of alcohol in the person's blood or breath at the time alleged as shown by analysis of his

blood or breath is less than 0.10 percent by weight of alcohol in his blood or 0.10 grams of alcohol per two hundred ten liters of the person's breath, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

2. The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

3. Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or RCW 46.61.504 shall have been performed according to methods approved by the State toxicologist and by an individual possessing a valid permit issued by the state toxicologist; for this purpose. The state toxicologist is directed to approve

satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

4. When a blood test is administered under the provisions of RCW 46.20.305, the withdrawal of blood for the purpose of determining its alcoholic content may be performed only by a physician, a registered nurse, or a qualified technician. This limitation shall not apply to the taking of a breath specimen.

5. The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer on or more tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of

evidence relating to the test or tests taken at the direction of a law enforcement officer. 6. Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or test shall be made available to him or his attorney.

RCW 46.20.308(2), which provides, in part, that:

The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506.

WAC 448-13-020, which provides that:

Pursuant to RCW 46.61.506, the BAC Verifier DataMaster is the only infrared breath test instrument approved by the state toxicologist as a device for the measurement of alcohol in a person's breath. A simulator filled with a certified simulator solution will be attached to each instrument to provide a known external

standard as defined in WAC 448-13-030(13). The simulator used must be on the National Highway Traffic Safety Administration (NHTSA) conforming products list. Any agency, group, or individual seeking approval or certification from the state toxicologist for the use of other breath test instruments for evidential breath testing programs in the state of Washington should contact the state toxicologist at the address given in WAC 448-13-210.

WAC 448-15-020, which provided that: Analysis of urine for the estimation of blood alcohol concentration is not approved by the State Toxicologist for use in the State of Washington.

## STATEMENT OF THE CASE

The Petitioner was prosecuted for the crime of driving while under the influence of alcohol and with a blood alcohol reading over .10 percent by weight, as measured by analysis

of his breath. At trial the Petitioner moved to suppress the result of the test of his breath and the motion was denied. The breath test results were thereafter admitted into evidence and were the chief evidence against the Petitioner. The Petitioner was convicted on June 26, 1992 in Burlington Municipal Court. Petitioner's Appeal to Skagit County Superior Court was denied. On Petition for Discretionary Review to the Court of Appeals of the State of Washington, Division One, the court accepted review of the following issue: "Did the failure to provide implied consent warnings in the precise language of RCW 46.20.308 regarding the right to additional tests preclude the admission of the breath test results?, and took argument on Petitioner's contention that the State's failure to properly conduct its implied consent scheme violated due process.

The Court of Appeals, on December 27, 1994, affirmed the decision of the trial court. In

its written opinion (Appendix B) the court stated, in part, "[Petitioner] argues that Clyde Hill did not expressly evaluate the need to refer to the statute in light of a driver's due process right to obtain potentially exculpatory evidence." On May 10, 1995, The Supreme Court of the State of Washington denied Petitioner's Petition for Review.

The implied consent warnings given to the Petitioner stated, in pertinent part, as follows:

"Further, you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently to determine alcohol content. You are now advised that you have the right to refuse this breath test; that if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person or your own choosing and that your refusal to take the

test may be used in a criminal trial.

At trial the admissibility of breath test results were challenged at trial on three grounds. The challenge pertinent to this Petition is as follows:

The implied consent warnings given by police, in conjuction with the state's regulatory scheme, were incorrect and illusory, and prevented the defendant from obtaining exculpatory evidence.

The Court of Appeals of the State of Washington denied, at P.3 of its opinion, the Petitioner's due process argument, and affirmed the order of the trial court. The Supreme Court of the State of Washington denied the Petitioner's Petition for Review, and this Petition was filed.

## REASONS FOR GRANTING THE WRIT

In Washington State, a motorist may be convicted of a crime either if he has a breath alcohol content greater than .1 grams per 210 liters of breath, or if he has a blood alcohol

content greater than .10%. Any disparity between blood/breath rations is not, in Washington State, a defense to a charge of a per-se violation of either charge. State v. Brayman, 110 Wn.2d 183, 751 P.2d 294 (1988) Thus, a blood test which showed a content under the limit for blood would not exonerate a defendant from a charge based on breath content. When read in conjunction with the state's implied consent statute, Washington's regulatory scheme has effectively rendered moot any attempt by defendants to gather the kind of exculpatory evidence contemplated by the statute, and the warnings rendered thereunder.

One underlying purpose of an implied consent statute should be to provide the automobile operator with the opportunity to exercise an intelligent judgment whether to exercise the statutory right of refusal to take the breath test, and the statutory right to additional tests to provide exculpatory

evidence. It would then seem that a defendant is entitled to accurate advice in order to insure that he or she has the opportunity to make an meaningful choice. This is required as a part of the Washington statutory requirement and is an important protection of the subject's right to fundamental fairness which is built into the implied consent procedure. In the case of State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989), the Washington Supreme Court discusses at length the legislative history of RCW 46.61.517. That opinion carefully analyzes the procedural history of RCW 46.61.517 and previous case law decisions interpreting RCW 46.61.517.

On March 29, 1991, new Washington Administrative Code (WAC) provisions promulgated by the Washington State Toxicologist took effect, designating the "BAC Verifier DataMaster" as the only approved breath testing device in the State of Washington. On the same date, WAC 448-15-020

took effect. It specifically provides that "Analysis of urine for the estimation of blood alcohol concentration is not approved by the State Toxicologist for use in the State of Washington."

RCW 46.20.308(2) provides, in part, that: " . . The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. (emphasis supplied)

State law is clear that the correct presentation of the implied consent provisions is a condition precedent to the admission of a breath test administered thereafter. State v. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989). The court in Bartels, was asked to promulgate a "bright line rule" establishing the required advice that must be given. At page 886 it did so:

"Accordingly, every DWI suspect must be

advised of these four distinct rights: (1) "you have the right to refuse the breath or blood test;" (2) "if you refuse to submit to the test your privilege to drive will be revoked or denied;" (3) "your refusal to take the test may be used in a criminal trial;" and (4) "if you take the breath or blood test, you have the right to additional tests administered by any qualified person of your own choosing." (emphasis supplied) Significantly, the quoted language is taken directly from the statute.

By failing to comply with the Bartels doctrine it is clear that the police, and the state's regulatory scheme, failed both to provide, and to properly advise of, the right of the Petitioner to additional tests of any efficacy. The Petitioner was asked to submit to a test of the breath, which consisted of two separate samples. The clause "right to additional tests" clearly relates to a breath

test, effectively advising only of the right to an additional test of breath.

By failing to adhere to the Bartels "bright line rule" the rights actually provided failed to give the Petitioner the right to an additional test of a bodily substance other than breath, and in so doing, violated RCW 46.20.308, the implied consent law.

RCW 46.20.308(2) clearly incorporates RCW 46.61.506 in its entirety, not just subsection five as it relates to the definition of a qualified person. Had the legislature intended to limit the incorporation to that subsection, it would clearly have so stated, as it did earlier in 46.60.308(2) when it provided that "a blood test" shall be administered by a qualified person as provided in RCW 46.61.506(4).

Since RCW 46.20.308(2) incorporates all of RCW 46.61.506, and RCW 46.61.506 provides for a breath test of a certain kind and a blood test meeting certain standards, failure to

provide a driver of his right to different tests, such as a blood test, rather than additional tests, fails to comply with the statutory mandate, and the concept of fundamental fairness.

But, even if it were held that the implied consent statements were sufficient, there are additional due-process problems with the state's implied consent process. Through the adoption of WAC 448-13, Washington State has effectively "decertified" the "Breathalyzer" device formerly used in the state. As a result the "BAC Verifier DataMaster" device is the only breath testing device approved in the State of Washington. There are no "DataMasters" in the hands of private persons. Only the police have the approved breath-testing device. There are no operators of the "BAC Verifier DataMaster" that are approved other than police officers or other state witnesses.

The WAC provision governing blood tests, WAC 448-15-020, specifically disapproves the testing of urine for alcohol content. That would appear to leave only a blood test as an available "additional test." However, State v. Brayman, 110 Wn.2d 183, 751 P.2d 294 (1988) specifically ruled that blood test evidence is irrelevant in determining breath alcohol content.

Brayman noted that the state did not have a monopoly on breath testing devices at the time the case was decided. Now the state does have such a monopoly. The actions of the State Toxicologist, in conjunction with the Supreme Court decision in Brayman, have now totally rendered the due process underpinnings of the implied consent law illusory. The illusory nature is made most clear by the fact that even a blood test showing a limit below .10% would not have provided a defense to the charge. Under the law, additional blood,

breath, or urine tests would have been either unavailable, or to no avail whatsoever.

Ready access to alternative evidence, or alternative verification of the accuracy of state-compelled testing is a necessary and statutorily-required inducement to a driver to submit to an officer controlled test and carries with it substantial due-process implications. In failing to properly inform drivers of the right to additional tests of bodily substances other than breath, or in preventing such tests altogether, the implied consent scheme at issue runs counter to fundamental concepts of fairness, and may well be totally illusory.

The inadequacy of the implied consent process is particularly harmful considering that the right to acquire other tests which may impeach the State's test is one of the constitutional lynch-pins which support the informed consent statute. As the Court stated in California v. Trombetta, 467 US 479, 81 L

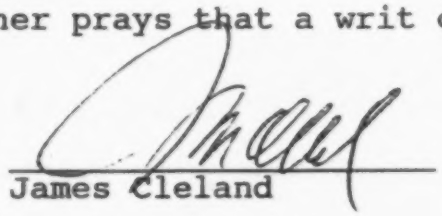
Ed 2d 413, 104 S Ct 2528 (1984): "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundemental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, Id., at 485, 81 L Ed 2d 413, 104 S Ct 2528. It is urged that central to a fair trial is the right to obtain and present exculpatory evidence, for which the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence....taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous convictions and ensuring the integrity of our criminal justice system." California v. Trombetta, Id., at 485, 81 L Ed 2d 413, 104 S Ct 2528.

When evidence is lost but for immediate notice that it could have been sought in pursuit of a defense case, the state bears a responsibility for the loss of that evidence. There can be no question but what due process is lacking because there is no later date at which such evidence could be gathered once the opportunity has been lost by failure to alert the accused to the possibility of tests of other body substances, if such really exist.

It may be that the "BAC Verifier DataMaster" is a good scientific device, but if the legislature of the State of Washington has chosen to somewhat "hedge" its confidence in proprietary technology, by giving its citizens a means to challenge the device's infallibility, fairness demands that the right not be an illusion.

## CONCLUSION

WHEREFORE, the Petitioner prays that a writ of certiorari be granted.



James Cleland

THE SUPREME COURT OF WASHINGTON

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| CITY OF BURLINGTON,<br><br>Respondent,<br>vs.<br><br>JAMES CLELAND,<br><br>Appellant | ) | NO. 62549-2<br><br>ORDER |

All five members of Department I of the Court considered the matters set on its May 10, 1995, Motion Calendar, the files herein and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered;

IT IS ORDERED That the Petition for Reviw is denied.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| CITY OF BURLINGTON,<br><br>Respondent,<br>vs.<br><br>JAMES CLELAND,<br><br>Appellant | ) | NO. 32296-6-I<br><br>DIVISION ONE |

Coleman, J. -- James Cleland appeals the denial of his motion to suppress evidence. He contends that breath test results should have been suppressed because he received an implied consent warning that did not follow statutory language precisely. We affirm.

James Cleland was arrested on August 14, 1991, for suspicion of driving a motor vehicle while intoxicated. The arresting officer administered the following implied consent warning to Cleland:

[Y]ou are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently, to determine alcohol content. You are now advised that you have the right to

refuse this breath test; that if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person of your own choosing and that your refusal to take the test may be used in a criminal trial. Cleland signed a statement that contained a copy of this warning and acknowledged, "I have read or have had read to me the above statement." He then gave two breath samples for the BAC Verifier DataMaster to analyze for alcohol content. The readings exceeded legal limits. Cleland moved to suppress these results on the grounds that the implied consent warning was insufficient. The Municipal Court of Burlington denied that motion, and Cleland was found guilty by stipulated trial. On RALJ appeal, the Skagit County Superior Court affirmed. This court granted discretionary review.

The sole issue to be determined is

whether failure to provide implied consent warnings in the precise language of RCW 46.20.308 regarding the right to additional tests precludes admission of breath test results. The implied consent statute provides in pertinent part:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcoholic content[.]

(2) . . . The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. . . RCW 46.20.308. The warning Cleland received did not include the language "as provided in RCW 46.61.506." RCW 46.61.506 details testing standards, qualifications of the persons administering

the State tests and independent tests, and the right of a driver to all information concerning the test administered by the police.

Cleland contends the warning, without the reference to RCW 46.61.506, failed to alert him to the existence of tests other than breath tests and denied him the right to obtain exculpatory evidence. Cleland's main argument concerns the absence of advice as to the availability of additional blood tests. He reasons that because the only test mentioned in the warning is the breath test administered by the police officer, the reference to additional tests is misleading because it implies only additional breath tests. He contends that RCW46.20.308(2) and 46.61.506 require express reference to blood tests. This court has declined to read such a requirement into the implied consent statutes. Clyde Hill v. Rodriguez, 65 Wn. App. 778, 831 P.2d 149, review denied, 119

Wn.2d 1022 (1992). Recognizing that Clyde Hill controls this matter, Cleland asks us to reconsider that decision. He argues that Clyde Hill did not expressly evaluate the need to refer to the statute in light of a driver's due process right to obtain potentially exculpatory evidence. Because we find Clyde Hill persuasively reasoned and correctly decided, we decline Cleland's invitation.

A driver stopped on suspicion of DWI has a statutory right to be advised of his or her right to additional tests. Underlying this statutory right to disclosure is a due process requirement that a driver be given a reasonable opportunity to procure potentially exculpatory evidence. See Blaine v. Suess, 93 Wn.2d 722, 612 P.2d 789 (1980). The right to obtain additional tests permits a driver to obtain evidence with which to impeach the result of a state-administered test, thereby protecting the driver's "right to fundamental fairness which is built into our implied

consent procedure." State v. Bartels, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989) (quoting State v. Canady, 90 Wn2d 808, 817, 585 P.2d 1185 (1978)). See also Clyde Hill, at 780. A DWI suspect must act promptly to obtain an additional test because evidence of intoxication dissipates rapidly over time. Bartels, at 887. Cleland argues that Clyde Hill is incorrect when viewed in light of the State's duty to preserve evidence. Cleland equates failure to include a reference to RCW 46.61.506 to withholding material evidence. We disagree.

Clyde Hill noted the importance of advising drivers of additional tests with regard to allowing a driver to impeach State tests and to fundamental fairness. However, the court in that case did not require the warning to list the types of available tests or to refer to RCW 46.61.506. Instead, the court found that "a simple reference" to additional tests better puts a driver on

inquiry notice. Clyde Hill, at 784 n.4 (citing State v. Richardson, 81 Wn2d 111, 116, 499 P.2d 1264 (1972)). The better practice is for law enforcement to inform drivers in general language . . . of the availability of additional testing. Such wording is sufficient to apprise them that they may seek other tests. This approach follows that of the Supreme Court in State v. Richardson, 81 Wn.2d 111, 499 P.2d 1264 (1972). There, the court held that the term "qualified person" was adequate in the context of the implied consent warning, and that the warning need not include a listing of the types of persons qualified to administer tests. In so ruling, the court stated, "if the arrested person decides to exercise his right to have additional tests made, he may ask for the further information." 81 Wn.2d at 116. We find that reasoning to be equally applicable here.

(footnote omitted) Clyde Hill, at 784. The

court noted that reference to RCW 46.62.506 was unnecessarily duplicative, because it would merely provide inquiry notice equal to the notice given by the words "additional tests" or "one or more tests." Clyde Hill, at 784.

Under Clyde Hill, Cleland did not receive an inaccurate or misleading warning. The simple reference to additional tests adequately puts drivers on inquiry notice. The purpose of notifying drivers of additional tests is to provide them the opportunity to obtain potentially exculpatory evidence. This purpose does not require the State to notify every driver of the existence of a particular statute, which does not even list other types of available tests.

The order of the trial court is affirmed.

COLEMAN, J., KENNEDY, J. AND AJID, J. CONCURRING

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No. 95-499

In The

# Supreme Court of the United States

October Term, 1995

JAMES CLELAND,

*Petitioner,*

*vs.*

CITY OF BURLINGTON,

*Respondent.*

*On Petition for a Writ of Certiorari to the Washington State Supreme Court*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Do the implied consent warnings that Washington State law mandates be given to DWI suspects before the administration of a breath alcohol test, impermissibly interfere with a defendant's ability to obtain exculpatory evidence?

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## STATEMENT OF THE CASE

The petitioner, an attorney licensed to practice in the State of Washington, was cited into Burlington Municipal Court on August 14, 1991 for Driving While Intoxicated (DWI). He was given the opportunity to have his breath tested for alcohol content by the BAC Verifier DataMaster.[1] He gave two samples. The result of the first sample was .14 grams of alcohol per 210 liters of breath and the second sample was .15 grams of alcohol per 210 liters of breath.[2]

Prior to submitting to the test the arresting officer read Mr. Cleland the implied consent[3] warning per Washington State

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1. The BAC Verifier DataMaster, approved by the Washington State Toxicologist per state statute, operates on the principle of infrared spectroscopy. WAC (Washington Administrative Code) 448-12-210 through 448-12-340, RCW 46.61.506(3). *State v. Ford,* 110 Wash. 2d 827, 829, 755 P.2d 806 (1988).

2. Under Washington state law a person is guilty of driving under the influence of alcohol if the person drives a vehicle with a breath alcohol concentration of 0.10 grams of alcohol (or higher) per two hundred ten liters of breath. RCW 46.61.502, RCW 46.61.506.

3. Any person who operates a motor vehicle within the state of Washington is deemed to have given consent to a test of his or her breath or blood for the purpose of determining alcohol content if arrested for any offense where the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor. RCW 46.20.308(I). However "[t]he officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver that (a) his or her privilege to drive will be revoked or denied if he or she refused to submit to the test, and (b) that his or her refusal to take the test may be used in a criminal trial." RCW 46.20.308(2).

Initiative 242 and RCW 46.20.308. The warnings were read to the petitioner as follows:

> Warning: You are under arrest for driving a motor vehicle while under the influence of intoxicating liquor. Further, you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently to determine alcohol content. You are now advised that you have the right to refuse this breath test; but if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person of your own choosing and that your refusal to take the test may be used in a criminal trial.[4]

The petitioner signed a copy of the warning stating that "I have read or have had read to me the above statement."

A motion to suppress the DataMaster breath test results based on the implied consent warning was made at the municipal court level. The petitioner framed the issue as follows:

> Were the implied consent warnings read to the defendant sufficient to inform him of his

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4. The refusal of a person to submit to a test of the alcoholic content of the person's breath is admissible into evidence at a subsequent trial. RCW 46.61.517.

> right to have an additional test of bodily substance other than breath?

The motion to suppress was denied and the petitioner was found guilty by stipulated trial on June 26, 1992.

The Superior Court of Skagit County, Washington affirmed the petitioner's conviction on his first direct appeal.

Division I of the Washington State Court of Appeals accepted the case on discretionary review framing the issue as follows:

> Did the failure to provide implied consent warnings in the precise language of RCW 46.20.308 regarding the right to additional tests preclude the admission of the breath test results?

A unanimous court answered that question in the negative and affirmed Cleland's conviction in an unpublished opinion on December 27, 1994. (The opinion is included in Cleland's Petition for Writ of Certiorari at p. 23.)

The Washington State Supreme Court denied discretionary review on May 10, 1995.

## REASONS FOR DENYING THE WRIT

After being arrested for DWI but before having his breath tested for alcohol the petitioner was given the following warning:

> You are under arrest for driving a motor vehicle while under the influence of intoxicating liquor. Further, you are now

> being asked to submit to a test of your ***breath*** which consists of two separate samples of your ***breath***, taken independently to determine alcohol content. You are now advised that you have the right to refuse this ***breath*** test; but if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person of your own choosing and that your refusal to take the test may be used in a criminal trial.

(Emphasis added).

He claims that because the only test mentioned in the warning is the breath test he was misled into believing that the breath test was the only "additional test" available. Presumably, although Cleland doesn't make the claim, if he had known that other tests were available he would have obtained them and proved his innocence. But since he was thus misled into believing he may obtain only a breath test and "[t]here are no "Datamasters" in the hands of private persons"[5] (Petition at p. 17) he missed his opportunity to obtain a different test of intoxication — a blood test, for example — and the evidence dissipated with the passage of time.

Thus, according to Cleland, the City failed to preserve exculpatory evidence by not explaining that the term "additional tests" includes a plethora of possible tests of intoxication including a blood test.

To accept Cleland's position, one must conclude that

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5. This allegation is unsupported by the record.

Cleland, an attorney licensed to practice in the State of Washington, was incapable of understanding the meaning of simple language and that somehow the use of the words "additional tests" limited the type of available tests and thus precluded him from making an intelligent decision whether to exercise his statutory right of refusal under RCW 46.20.308.

Cleland's argument requires that one read each sentence of the Implied Consent Form without regard to the other sentences therein.

In sentence two of the form, it states:

> You are now being asked to submit to a test of your *breath* which consists of two *separate* samples of your breath taken independently to determine the alcohol content.

(Emphasis added)

The second sentence of the Implied Consent Form limited the type and number of tests the City could require of Cleland. The last sentence of the form, "you have the right to additional tests . . ." set no limitation on the type of tests nor on the number of tests Cleland could undertake on his own.

The Implied Consent Warning Form mentions a breath test and additional tests, one being singular and the other being plural, implying there are other types of tests that could be given.

**A. Due Process**

The petitioner's due process argument relies solely on *California v. Trombetta*, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). There this Court again considered the question of

"access to evidence" guaranteed by the Due Process Clause of the Fourteenth Amendment. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 73 L. Ed. 2d 1193, 102 S. Ct. 3440 (1982); *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

*Trombetta* asked the question of whether the Due Process Clause of the United States Constitution[6] requires law enforcement to preserve breath samples of suspected drunk drivers.

Writing for a unanimous court Justice Marshall replied in the negative. Initially he found that law enforcement acted in accord with their normal practices and in good faith, quoting *Killian v. United States*, 368 U.S. 231, 7 L. Ed. 2d 256, 82 S. Ct. 302 (1961):

> ". . . if, [the evidence was] destroyed by the agents in good faith and in good accord with their normal practices, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right."

*Id.* at 242, 7 L. Ed. 2d 256, 82 S. Ct. 302.

*California v. Trombetta*, *supra* at 487, 81 L. Ed. at 421. Cleland has shown no evidence that law enforcement did not act in good faith and in good accord with their normal practices.

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6. The Washington State Supreme Court has recently decided that in the context of preservation of evidence the Due Process Clause of the Washington State Constitution, Article 1 Section 3, does not afford greater protection than its counterpart in the United States Constitution. *State v. Wittenbarger*, 124 Wash. 2d 467, 481, 880 P.2d 517, 524 (1994).

## B. Materiality

The evidence which Cleland complains the police failed to preserve does not meet the "standard of constitutional materiality." Evidence is constitutionally material if it had an apparent exculpatory value before destruction and if the defendant is unable to get comparable evidence by other reasonably available means. *Trombetta* at 489. After reviewing the testing procedures of the intoxilyzer used by the California Department of Health the Court in *Trombetta* concluded the breath samples were not material:

> Once the intoxilyzer indicated that the respondents were legally drunk breath samples were much more likely to provide inculpatory then exculpatory evidence.

*Id.* at 489.

As in *Trombetta*, the chance is extremely remote that if Cleland obtained a blood test it would have been exculpatory. The Washington State Toxicologist has the delegated authority to draft breath testing procedures and protocols. RCW 46.61.506. Pursuant to this authority the state toxicologist approved the BAC Verifier DataMaster, a device that uses infrared spectroscopy for breath alcohol analysis. Infrared[7] alcohol analysis is widely accepted in the scientific community. To protect suspects against machine malfunction the toxicologist has developed test procedures that include: (1) the operator must

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7. *See State v. Crea*, 806 P.2d 445 (Idaho 1991) noting wide scientific acceptance of another infrared machine, the Intoximeter; *State v. Velasco*, 799 P.2d 821 (Ariz. 1990) noting the self-checking capabilities and regulatory safeguards make the Intoxilyzer, yet another infrared machine, extremely accurate.

observe the subject for fifteen minutes before the test and check his or her mouth for substances that might affect the test; (2) the subject must provide two valid breath samples, the results of which must be within 10% of the mean of the two samples; (3) the subject samples are bracketed by four "blank" tests of ambient air in the breath testing chamber that must result in a zero reading; (4) between each subject sample the machine tests the gas overlying a simulator solution. The simulator solution is a mixture of 90% water and 10% alcohol. The gas overlying that solution "simulates" breath alcohol. The result of the test of the simulator solution must be between .090 and .110 inclusive. WAC 448-13-040, 050 and 070.[8]

Technicians trained and certified by the state toxicologist perform periodic quality assurance that includes re-calibration and checks of each component and function of every BAC Verifier DataMaster instrument used by the State of Washington. WAC 448-13-110, 130. The state toxicologist certifies instructors to train operators. Only those persons who are competent and qualified to administer breath test for alcohol concentration using the BAC Verifier DataMaster are certified as operators. WAC 448-13-15.

Thus a dispassionate review of DataMaster and the Washington testing procedures here indicates that even if Cleland had obtained a blood test the chances are extremely low that it would have been exculpatory or even play a significant role in his defense. *Id.* at 488.

Turning to the second part of the materiality analysis, Cleland had alternative means with which to impeach the breath

8. The simulator solution is prepared by the forensic toxicology staff under the supervision of the state toxicologist. WAC 448-13-080. After mixing the solution according to the authorized protocol it is tested by gas chromatography. WAC 448-13-080.

test results. He had access to the protocols, regulations, breath test ticket, and the qualifications of the operator.[9] He could have used any of this information to attack the validity of the breath test.

A defendant may also impeach the accuracy of the DataMaster with expert testimony. Expert testimony might explore the validity of the physical, chemical or mathematical principles employed by the DataMaster. Similarly, testimony regarding the effect of physiological variations on DataMaster readings may be relevant.

**C. Bad Faith**

Finally, in *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988), Chief Justice Rehnquist, writing for the majority, ruled that unless a criminal defendant can show bad faith by the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

The record does not reflect nor does Cleland allege bad faith.

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9. All documents used by the state toxicologist and his personnel are available to the defense upon request. These documents include the breath test document, the simulator solution preparation protocol, the alcohol analysis protocol, the certification document for simulator solution, the affidavit from the analyst of simulator solution, the quality assurance protocol, the quality assurance procedure report, the affidavit concerning quality assurance procedure, the operator course outline, the operator refresher course outline and the operator training record. WAC 448-13-130, WAC 448-13-200.

## CONCLUSION

Based upon all of the foregoing authorities this Court should deny Cleland's petition for writ of certiorari.

Respectfully submitted,

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